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NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

OLD MOUNTAIN PROPERTIES, LTD.,
a Maryland limited partnership

Petitioner

versus

APRIL INVESTMENTS, INC.,
an Alabama corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where a "long-arm" defendant (here a limited partnership) seeks a protective order against deposition and production of records in the forum state on demand of a forum plaintiff, can the non-resident be forced to submit to such examination without plaintiff's making any showing whatsoever of special circumstances which would rebut the universal presumption in favor of requiring such examination at the place of defendant's residence?

II. Where the authorities uniformly interpret Rule 26(c), Federal Rules of Civil Procedure, so as to protect a non-resident defendant who did not choose the forum against the fundamental unfairness of forcing him to come to the forum State for discovery on threat of default judgment, can the State apply its identical Rule 26(c) so as to refuse such protection, or does such a refusal violate "due process"?

III. Where a State's procedural law expressly protects all witnesses who reside over 150 miles from the site of a deposition against submitting to such deposition unless the witness is tendered a witness fee and mileage, *and* where the State's law expressly protects the State's residents against deposition except in the county where they reside or are employed, can that State nevertheless require a non-resident deponent who lives over 150 miles from the deposition site to submit to deposition at the forum where he neither resides nor is employed without tender of fee or mileage, or does such discriminatory treatment of non-residents violate "privileges and immunities" and/or "equal protection"?

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Petitioner

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an Alabama corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Old Mountain Properties, Ltd., petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above-entitled case on April 9, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama of April 9, 1982, 16 ABR 1314, as extended on June 11, 1982, 16 ABR 1929, [unreported as yet in So.2d], is printed in Appendix A hereto, *infra*, p. A-8. The judgment of the Supreme Court of Alabama is printed in Appendix A hereto, *infra*, at p. A-14. The order of the Supreme Court of Alabama striking petitioner's second application for rehearing and denying

petitioner's motion for a stay is printed in Appendix A hereto, *infra*, p. A-15.

JURISDICTION

The judgment of the Supreme Court of Alabama (Appendix A, *infra*, p. A-1) was entered on April 9, 1982. A timely petition for rehearing was denied on June 11, 1982, although the opinion was extended. (Appendix A, *infra*, p. A-8). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND PROCEDURAL RULES INVOLVED

I. The Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the *privileges or immunities* of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without *due process of law*; nor deny to any person within its jurisdiction the *equal protection of the laws*. (emphasis supplied.)

II. Rule 26(a) (c), Alabama Rules of Civil Procedure:

> (a) Discovery Methods. Parties may obtain discovery by one of more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes;

physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(c) Protective Orders. *Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition or production or inspection, the court in the circuit where the deposition or production or inspection is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,* including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed

envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion. (emphasis supplied).

III. Rule 45(c) and (d) (2), Alabama Rules of Civil Procedure:

(c) Service. A subpoena may be served by the sheriff, by his deputy, or by any other person who is not a party and is not less than 18 years of age, and his return endorsed thereon shall be prima facie proof of service, or the witness may acknowledge service in writing on the subpoena. Service of the subpoena may be executed upon the witness either personally or by leaving a copy at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. *Where the witness resides more than 150 miles from the place of the hearing or trial, he shall be tendered at the time of service, the fee for one day's attendance plus mileage* allowed by law, such fee to be paid by the party causing the subpoena to be issued.

(d) Subpoena for Taking Depositions; Place of Examination.

(2) *A resident of the state of Alabama may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A non-resident of this state subpoenaed within this state may be required to attend only in the county wherein he is served, or at a place within this state not more than 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.*
(emphasis supplied).

STATEMENT OF THE CASE

The basic facts, the lower court proceedings, and some of the issues are set forth in the opinion of the Supreme Court of Alabama and in the dissent written by Chief Justice Torbert. Appendix A, *infra* p. A-5.

Old Mountain Properties, Ltd. (Old Mountain) is a Maryland limited partnership with its principal place of business in Jacksonville, Florida, where its general partner, Charles A. Clarkson (Clarkson), resides. April Investments, Inc. (April Investments), an Alabama corporation, filed a complaint against Old Mountain in Birmingham, Alabama, under Alabama's "long-arm" statute, with jurisdiction based on Old Mountain's minimum contacts with Alabama. Thereafter, April Investments filed notice of taking the deposition of Clarkson in Birmingham. The Alabama courts, and this Court, can take judicial knowledge of the fact that Jacksonville is more than 150 miles from Birmingham. Old Mountain sought a protective order on these facts, insisting that the Clarkson deposition should take place in Jacksonville. April Investments presented no additional facts to the trial court, and did not tender a witness fee or mileage to Clarkson or to

Old Mountain, nor offer to reimburse the costs of Clarkson's travel or the transportation of Old Mountain's records to Birmingham. The trial court denied the requested protection and, although secondarily requested by Old Mountain to do so, required no expense reimbursement for the trip to Birmingham. This, in effect, meant that unless Old Mountain submitted to deposition in Birmingham, the sanction of default judgment against it would follow.

The Supreme Court of Alabama affirmed the trial court on petition for mandamus. A strong dissent was written by Chief Justice Torbert. The majority held that such discovery matters are entirely within the discretion of the Alabama trial courts. The majority did not address any of the constitutional questions inherent in the fact and procedural situation. In Chief Justice Torbert's dissent, he stated Old Mountain's position better than it can as follows:

> The general rule regarding pretrial discovery, though not specifically addressed by any Alabama cases, has been enunciated on several occasions by the federal courts and it states that the deposition of a corporate officer or agent (or, as here, a member of a limited partnership) must be taken at the business's principal place of business, absent peculiar circumstances justifying a change of venue. See, *e. g., Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979); 8 C. Wright and A. Miller, *Federal Practice and Procedure*, §212 at 410 (1970). It is fundamentally unfair to require a non-resident defendant, as here, to leave his place of business and travel at his own expense to the site of the deposition so that it can be taken more conveniently and less expensively to the plaintiff. *Less v. Taber Instrument Corp.*, 53 F.R.D. 645

(2) *A resident of the state of Alabama may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A non-resident of this state subpoenaed within this state may be required to attend only in the county wherein he is served, or at a place within this state not more than 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.*
(emphasis supplied).

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(W.D.N.Y. 1971); *Perry v. Edwards*, 16 F.R.D. 131 (W.D. Mo. 1954). This rule, of course, may be altered if justice requires, upon the showing of *peculiar facts and circumstances*, which showing then gives the trial judge broad discretion to determine what circumstances will justify a change in the site of the deposition. Here, however, the only possible rationale for requiring the deposition to be taken in Birmingham was that Old Mountain Properties, LTD., owned some real estate in Alabama, thus providing minimum contacts. No peculiar facts and circumstances, however, were shown by April Investments, Inc., to justify the request to depose the general partner of Old Mountain Properties, LTD., in Birmingham.

While the definition of "good cause" has not yet been decided in Alabama, I believe that once a non-resident corporate defendant seeking a protective order has demostrated that it is, in fact, a non-resident defendant and that the plaintiff seeks to compel its officer or agent to come into the state to be deposed, it has *prima facie* supplied the "good cause" required by A.R.C.P. 26(c) to compel the issuance of the protective order. At this point, the non-movant must assume the burden of proof to show "peculiar facts and circumstances" to justify a variance from the general rule. Such circumstances might include a consideration of the relative hardships to the non-moving party should the protective order be granted, a conflict in the evidence as to the corporation's principal place of business, the fact that the corpora-

tion's officers visit Alabama regularly, and/or the fact that the plaintiff is impecunious. *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204 (8th Cir. 1973); *Baker v. Standard Industries, Inc.*, 55 F.R.D. 178 (D.P.R. 1972); *Connell v. Biltmore Security Life Insurance Co.*, 41 F.R.D. (D.S.C. 1966); *Hirsch v. Glidden Co.*, 79 F. Supp. 729 (S.D.N.Y. 1948). Here, Old Mountain Properties, LTD., clearly showed that it was a non-resident defendant, yet April Investments, Inc. made absolutely no showing of any peculiar facts and circumstances that would justify the taking of the deposition in Birmingham.

The decision of the majority, in effect, makes Alabama the only jurisdiction to allow, as a matter of course, a plaintiff to chose his own forum based upon the defendant's minimum contacts, litigate all of the issues in his home territory, and compel a non-resident defendant to travel at his own expense to the forum whenever the plaintiff feels the need for discovery. This is not only contrary to the general rules of discovery, but is also, as a matter of policy, fundamentally unfair to the defendant. Appendix A, *infra* p. A-5–A-7.

This original opinion was handed down on April 9, 1982. Justice Almon for some unexplained reason did not participate. *On the same day*, Justice Almon, writing for the majority in *Ex parte Richard E. Armstrong*, 412 So.2d 772 (Ala. 1982), announced this as the law of Alabama at 412 So.2d 773:

> Depositions of a corporation through its officers or agents should ordinarily be taken at the corporation's principal place of business, especially when the corporation is a defendant. *Salter v. Upjohn Company*, 593 F.2d 649 (5th Cir. 1979). There may be circumstances that would justify the taking of a deposition somewhere other than the corporation's principal place of business.

In other words, one panel of the Supreme Court of Alabama in a majority opinion correctly cited *Salter v. Upjohn Co.* for the universally recognized presumption against requiring a foreign deponent to come to the forum for examination, while in Old Mountain's case simultaneously another panel of the same court repudiated the same presumption which was cited by Chief Justice Torbert in dissent. The anomoly is obvious. The opinion of April 7, 1981, was received by Alabama's litigators with consternation and disbelief. There were several attempts by others to appear *amicus curiae* in support of Old Mountain's quick application for re-hearing. All such attempts were rebuffed by the Alabama Court and the profferred *amicus* briefs were stricken. One such profferred brief is attached hereto as Appendix B, *infra*, p. A-17–A-20, not only as an example of lawyer reaction but as a lucid criticism of the decision.

On re-hearing, Old Mountain pointed out the inconsistency of the Supreme Court of Alabama, pointed out the equation of "fundamental fairness" with "due process" and further pointed out the denial of "equal protection" and "privileges and immunities". On June 11, 1982, the Court responded with a denial of Old Mountain's application, but extended the Opinion with an attempt to reconcile the irreconcilable by implying some sort of distinction between corporations and limited partnerships and by finding that the physical presence of Clarkson in Alabama *prior to the filing of April*

Investments' suit was enough to rebut the *Salter v. Upjohn Co.* presumption. This extension, longer than the original opinion, appears in Appendix A, *infra*, at p. A-8–A-13.

Then, in a second application for re-hearing, Old Mountain addressed the Alabama Court as follows:

> The extended opinion of June 11, 1982, raises more questions than it answers. It nowhere denies the concept that a "general rule" creates a presumption, which must be rebutted if an application of the "general rule" is to be avoided. In other words, once facts bring a particular situation within a "general rule", the party seeking to avoid an application of the rule must present facts to extricate himself from its application. Because the Court does not and cannot avoid this concept, nor the existence of the general rule recognized by the Chief Justice in his dissent in this case, and *by a majority of this Court* in *Ex parte Armstrong*, 412,So.2d 772 (Ala. April 9, 1982), both citing *Salter v. Upjohn Company*, 593 F.2d 649 (5th Cir. 1979), the Court has now cast around for anything which will rebut the presumption applicable to this case and will take it out from under *Salter v. Upjohn*. In its extension of June 11, 1982, the Court struggles and comes up with two alleged factual distinctions which, it is speculated, could have provided the trial judge a basis for positioning this particular deposition notice outside the general rule.
>
> The first of these "distinctions" is this finding by the Court:

> . . . *Ex parte Armstrong* dealt with the depositions of a *corporate president,* and in this case, the person sought to be deposed was the general partner of Old Mountain Properties, Ltd., . . .".
> (emphasis the Court's) p. 10 of Opinion.

It seems, then, that the Court would recognize a difference between depositions of corporations and depositions of limited partnerships. Why? For what reason? It goes with out saying that a corporation can exist with only one stock holder, whereas a limited partnership cannot exist with only one partner. For aught appearing in this record, Old Mountain Properties, Ltd., has 2,000 partners. The form of a business entity cannot logically constitute a "circumstance" upon which to base a different application of the general rule in *Salter v. Upjohn*. It is a distinction without a difference in the contexts of trial discovery and of fundamental fairness. This Court creates a distinction between Old Mountain Properties, Ltd., and Ford Motor Company which won't stand the test of logic. There are many reasons for a prospective business enterprise to choose a particular form. The ease with which a corporate officer, as opposed to a partnership officer, can be forced to leave his place of business to be deposed in a foreign forum state, should not, as a matter of public policy, become a factor in determining which business form to take. The Court here grasps for a distinction beyond its reach.

The second "would-be" distinction announced by the Court on June 11, 1982, is:

> . . . *the person sought to be deposed* personally dealt with the plaintiff, April Investments, in the State of Alabama, and frequently came to *Alabama* to participate in transactions made the basis of the very action in which the discovery is sought. (emphasis supplied). p. 10 of opinion.

Counsel for petitioner has read and has reread the petition for mandamus (to which the initial complaint of April Investments, Inc. is attached), and the answers filed by Honorable Thomas E. Huey, Jr. [the trial judge], and by April Investments, Inc. to the petition. He cannot find any allegation or any statement whatsoever to the effect that Charles A. Clarkson [the general partner] *"frequently came to Alabama."* In other words, for aught appearing in the record before Honorable Thomas E. Huey, Jr., and before this Court, Charles A. Clarkson, the general partner, only came to Birmingham, Jefferson County, Alabama, on one occasion before the suit and never comes now. Where did the Court get its information that he came "frequently"? The Court is simply wrong on this crucial fact.

The last sentence of paragraph 2 of Honorable Thomas E. Huey Jr.'s answer to the petition does not state what was actually said at the hearing which he held on Old

Mountain Properties, Ltd.'s motion for protective order. It, rather, constitutes an argument. Furthermore, the assertion which says, "the *defendant* having come to Alabama on numerous occasions", does not lend itself to an interpretation that Charles A. Clarkson *himself* frequently came to Alabama. The contrary is true, but to say so is to go outside the record.

Not only does the Court on June 11, 1982, mis-state the factual record, but if one were willing to imagine (and to raise speculation to the dignity of fact) that Charles A. Clarkson had personally participated in the transactions complained of by making frequent appearances in Jefferson County, Alabama, before suit, the federal decisions are unanimous in their recognition that an out-of-state person can be deposed in the forum state on account of business activity there *only where the officer transacts business regularly at the time of the requested discovery*. Old Mountain Properties, Ltd., will not repeat the cases previously cited for this proposition. This exception is in line with the purpose of the general rule, which is to minimize inconvenience to non-resident defendants. If the defendant's officials are *regularly* in the forum state, there is obviously no substantial inconvenience to the defendant. Therefore, the Court's assertion at p. 9 of its extended opinion that the Chief Justice "would find a clear abuse basis of discretion in any case where a non-resident defendant is involved" is, itself, a fundamentally unfair and inaccurate statement. What the Chief Justice

did say was simply that the burden was on April Investments, Inc. to show circumstances to justify the taking of Clarkson's deposition in Birmingham, and that it did not make any such showing. Under this Court's reasoning, connections with the forum state which occurred long before suit is filed can be used to compel a non-resident defendant to haul its records and officers to Alabama. This is a corruption of the recognized exception to the general rule. Under this newly discovered exception, a defendant who was present in Alabama ten years before suit is filed on an alleged cause of action with a ten year statute of limitations can be compelled to come to Alabama because of his mere presence in Alabama ten years earlier. Simply stated, such an exception emasculates *Salter v. Upjohn Company, supra,* and renders it meaningless.

For some reason the majority of the Court has chosen not to speak to the constitutional questions, one of which was addressed by the Chief Justice. From the Court's silence Old Mountain Properties, Ltd., assumes that the majority finds no constitutional questions. For this reason, Old Mountain Properties, Ltd., will not try to discuss "due process", etc., and will limit itself to the issues raised by what the Court *did* say without going into what the Court *did not* say.

On July 8, 1982, the Supreme Court of Alabama struck Old Mountain's second application for rehearing.

Old Mountain also filed with the Supreme Court of Ala-

bama a motion for a stay of its order pending an attempt to obtain a review by the Supreme Court of the United States. This request was summarily denied, meaning, in effect, that unless this Court orders a stay pending its consideration of Old Mountain's petition, Old Mountain must come over 500 miles away from its general partner's residence and submit for discovery in Birmingham, Alabama, or a default judgment will be entered against it.

The Due Process Question.

When Chief Justice Torbert twice used the words "fundamental unfairness" to describe the reason behind the general rule against making a foreign defendant come to the forum state for discovery, he was using words which describe the Fourteenth Amendment's requirement of "due process". If the Alabama Chief Justice's dissent is correct, then Old Mountain will be denied "due process" if it is required (without any affirmative showing having been made by April Investments of facts to rebut the presumption which appertains in every other jurisdiction, and thus to avoid the general rule) to honor the present mandate.

The Court of Appeals of North Carolina well stated the proposition here applicable in *Wake County ex rel. Carrington v. Townes*, 281 S.E.2d 765 (N.C. App. 1981), at 767:

> Indeed, the touchstone of due process is the presence of fundamental fairness in any judicial proceeding adversely affecting the interests of an individual.

Presumptively, the reach of this concept goes to limited partnerships and corporations as well as to humans. *See e. g., First National Bank of Boston v. Bellotti*, 435 U.S. 765,

779–780 (1978). There can be no logical reason for distinguishing between litigants as to "due process" requirements.

As recently as last year, this Court in *Lassiter v. Department of Social Services*, 452 U.S. 18, (1981), granted certiorari and said at 452 U.S. 24–25:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "Unlike some legal rules", this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Then, at 452 U.S. 33, the Court concluded:

> In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are *fundamentally fair*. (emphasis supplied).

Although all Justices of this Court did not concur in the *Lassiter* result, no Justice quarreled with the proposition that "due process" equates to "fundamental fairness". To like effect, is *Cox v. Burke*, 361 F.2d 183, 186 (7th Cir.

1966), *cert. den.* 3[illegible] U.S. 939 (1966), and *Watson v. Patterson*, 358 F.2d 297, 298 (10th Cir. 1966), *cert. den.*, 385 U.S. 876 (1966).

The major constitutional question, then, here becomes whether or not (1) Chief Justice Torbert, (2) *Salter v. Upjohn Co.* 593 F.2d 649 (5th Cir. 1979); (3) *Ex parte Richard E. Armstrong*, 412 S.2d 772 (Ala. 1982); (4) 4 J. Moore, *Federal Practice* ¶¶26.70 [1–3], [1–4] (2d ed. 1982); (5) 8 C. Wright and A. Miller, *Federal Practice and Procedure* §212 at 410 (1970); (6) *Less v. Taber Instrument Corp.*, 53 F.R.D. 645 (W.D.N.Y. 1971); and (7) *Perry v. Edwards*, 16 F.R.D. 131 (W.D. Mo. 1954), are all correct or are all incorrect when they announce the rule of *fundamental fairness*.

"Equal Protection" and "Privileges and Immunities".

In addition to the primary "due process" question addressed by Chief Justice Torbert, the fact that the Supreme Court of Alabama applied the Alabama Rules of Civil Procedure in a manner which materially discriminates between Alabama residents and residents of other States, raises two further issues under the Fourteenth Amendment. Not only is there a violation of "due process" by the procedural oppression inherent in the present decision, and by its predictable future application by Alabama's trial judges, but the decision also violates the "equal protection" and the "privileges and immunities" clauses. The reason is that, as affirmed here, the A.R.C.P. give treatment so disparate between Alabamians and others as to transgress one constitutional mandate of equal treatment by State law.

> Rule 45(c), Alabama Rules of Civil Procedure, provides:
>
> Where the witness resides more than 150 miles from the place of the hearing or trial, he

> shall be tendered at the time of service, the fee for one day's attendance plus mileage allowed by law, such fee to be paid by the party causing the subpoena to be issued.

Since Alabama courts do not have subpoena power beyond Alabama's borders, Rule 45 necessarily applies only to witnesses who reside in Alabama. A witness residing in Alabama therefore cannot be compelled to report for a deposition away from his place of residence without first being paid. A non-resident becomes the victim of invidious discrimination when he is forced to come over 150 miles to a place in Alabama without any reimbursement whatsoever for his expenses, as in the case at hand. There is no logical reason, and no fairness, in limiting the subpoena power of a Birmingham, Alabama, plaintiff as to a Mobile, Alabama, witness, while not limiting that power as to a Jacksonville, Florida, witness, much less as to a Fairbanks, Alaska, witness.

> Rule 45(d) (2), Alabama Rules, of Civil Procedure, provides:
>
> A resident of the State of Alabama may be required to attend an examination only in the county *wherein he resides or is employed or transacts his business in person*, or at such other convenient place as is fixed by an order of the Court. (emphasis supplied).

Old Mountain supposes that an argument can be made that "such other convenient place as is fixed by an order of the Court" could mean "convenient to the party taking the deposition", but the obvious intent of Rule 45 is to permit an alternative place only if *"convenient to the deponent"*. The intent here is to accommodate a resident Alabama deponent. Why should not a Florida deponent be likewise accommodated?

The Committee Comments following Rule 45, A.R.C.P., describe the purpose of 45(c) as *"in order to prevent abuse"*. It would be strange if Alabama can *prevent* the abuse of its own citizens and *allow* the abuse of non-residents. If such were the intent of Rule 45 (which petitioner thinks not), the intent runs head-on into the Constitution of the United States.

There is little need to expound the inequality of treatment as between Alabamians and others which inheres in the current decision of the Supreme Court of Alabama. "Equal protection" at a minimum requires that persons under State law be treated the same unless there is a distinction made between them which is persuasively rational and which furthers a legitimate public policy. Is it reasonable and legitimate public policy to make a Birmingham plaintiff come to Mobile to depose a Mobile defendant but to make a Jacksonville defendant come to Birmingham? Such a difference in treatment makes no sense. Thus, it violates "equal protection". The Supreme Court of Alabama did not even attempt to articulate a rationale for such a distinction. The decision by this Court on the meaning and purpose "equal protection" are so legion as to require no citation. Perhaps the closest decision on point is *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544 (1923), where this Court reversed the Supreme Court of Wisconsin for Wisconsin's discriminatory treatment of a nonresident corporation. This Court held that Wisconsin's procedural rules denied "equal protection" to a nonresident corporation which had brought suit in Wisconsin. *It had chosen the forum*. How much more so would this Court have found an "equal protection" violation if the disparate treatment had been bestowed upon a nonresident corporation *which had not selected the forum*. This Court said at 262 U.S. 551:

> . . . it cannot be subjected, merely because it is such a corporation, to onerous require-

ments having no reasonable support in that fact and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin, - - a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit.

We hold that the statute as it was applied in this case was invalid, and the orders made under it were erroneous, as denying to the plaintiff the equal protection of the laws. This conclusion renders it unnecessary to consider the contention made under the due process clause.

Closely akin to "equal protection" is "privileges and immunities". Petitioner invites the Court's careful attention to *Strauss v. Alabama State Bar*, 520 F.Supp 173, 179 (N.D. Ala. 1981), where the United States District Court for the Northern District of Alabama held that the "privileges and immunities" clause "precludes a state from imposing discriminatory burdens on non-residents. . ." Judge J.

Foy Guin very well stated the principles here applicable, and analyzes the pertinent decisions of this Court. At 520 F.Supp. 179, Judge Guin said:

> The purposes of the clause have been variously stated as to establish a "norm of comity," *Austin v. New Hampshire*, 420 U.S. 656, 660, 95 S. Ct. 1191, 1194, 43 L.Ed.2d 530 (1975), to prevent "a state from discriminating against citizens of other states in favor of its own," *Hague v. CIO*, 307 U.S. 496, 511 59 S. Ct. 954, 962, 83 L.Ed. 1423 (1939). to foster nationalism and assure equality of citizens within any state and thus "to constitute the citizens of the United States one people," *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180, 19 L.Ed. 357 (1869), cited in *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, 380–81, 98 S. Ct. 1852, 1858–59, 56 L.Ed.2d 354, 363 (1978). In short, the essence of the clause "prevents a State from discriminating against nonresidents merely to further its own parochial interests or those of its residents," *Godron v. Committee on Character and Fitness*, 422 N.Y.S.2d 641, 643, 397 N.E.2d 1309, 1311 (1979), citing *Hicklin v. Orbeck*, 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed.2d 397 (1978).

Petitioner joins Judge Guin in respectfully submitting that Alabama must not be allowed to discriminate "against citizens of other states in favor of its own," something the Alabama Courts have here done with their Rule 45.

REASONS FOR GRANTING WRIT OF CERTIORARI

Very recently at the annual meeting of the Alabama Bar Association this case was featured at the session of the Practice and Procedure Section. Out of over 50 lawyers present not one could understand the decision, much less could justify it.

Certiorari should be granted not just to prevent an injustice and a constitutional violation in this case but in order to prevent a maverick State Court opinion from encouraging all States of the Union to give their resident plaintiffs an advantage over non-resident defendants by permitting an exercise of unbridled discretion by their trial courts and to force non-resident defendants, at great expense and inconvenience, to come to the forum state for discovery.

This case is unique in several respects. Perhaps its most novel feature is that it is the only decided case in the United States which has ever laid down a rule to the effect that, absent some peculiar circumstance *shown by the forum plaintiff*, a non-resident defendant can be ordered to come to the forum state for deposition. Also unique is the anomaly inherent in the two opinions issued by the Supreme Court of Alabama on the same day, one citing *Salter v. Upjohn Co.* in dissent, and the other citing *Salter v. Upjohn Co.* in the majority opinion, both for the same proposition of law. *Salter v. Upjohn Co.* is a statement of constitutional principle which should be binding on the courts of all fifty states. The only way to make it binding and not to assure its early erosion and demise as a matter of "fundamental fairness", and thus of "due process", is for this Court now to make the constitutional principle abundantly clear. The cow should be kept in the barn.

Another compelling reason for granting certiorari in this

case is to demonstrate that the Fourteenth Amendment rights to "due process", to "equal protection" and to "privileges and immunities", as applied by this Court, are recognized as available to all persons and not limited to minorities or to the criminally accused. As important as the rights of traditionally deprived citizens are, business entities have civil rights too, and civil litigants are entitled to the fair treatment mandated by the Fourteenth Amendment. Otherwise, the concept of constitutional limitation on State action becomes, as a practical matter, unequal and narrow in its focus. Who, except the Supreme Court of the United States, can now protect Old Mountain from a violation of its constitutional rights? If the Supreme Court of Alabama can set up its bright new rule, then the leverage of foreign defendants by forum plaintiffs becomes a foregone conclusion. Ordering a foreign defendant to submit to discovery at a distant forum selected by the plaintiff, without plaintiff's showing a scintilla of evidence to rebut the clear presumption in *Salter v. Upjohn Co.*, is so fundamentally unfair, so unjust and so oppressive as to call for intervention by this Court. To deny certiorari here is to guarantee that forum plaintiffs all over the country will lick their chops at the new pressure they can apply to non-resident defendants.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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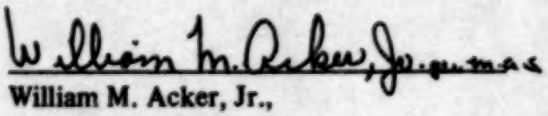
DOMINICK, FLETCHER, YEILDING,
ACKER, WOOD & LLOYD, P.A.

Of Counsel

CERTIFICATE OF SERVICE

I, William M. Acker, Jr., one of attorneys-of-record for petitioner, hereby certify that I have mailed a copy of the foregoing petition by United States mail, postage prepaid, to Messrs. Jack E. Held and Charles R. Driggars, 2222 Arlington Avenue, South, Birmingham, Alabama 35255, attorneys-of-record for April Investments, Inc., this 11 day of August, 1982.



William M. Acker, Jr.,
Attorney for Petitioner

APPENDIX A

April 9, 1982

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1981–82

Ex parte Old Mountain Properties, Ltd.

PETITION FOR WRIT OF MANDAMUS

(In Re: April Investments, Inc., a corporation v. Old Mountain Properties, Ltd., a Maryland limited partnership, et al.)

MADDOX, JUSTICE.

This is a ruling on a petition for a writ of mandamus wherein the petitioner asked this Court to direct the trial judge before whom this action was proceeding to change a ruling that that judge had made with regard to a certain discovery matter. Upon review, we find that the trial judge acted within the discretion vested in him as to these matters and, therefore, refuse to grant the writ asked for.

The petitioner is Old Mountain Properties, Ltd., a limited partnership organized and existing under the laws of the State of Maryland, with its principal place of business in Jacksonville, Florida. On October 15, 1980, April Investments, Inc., filed a complaint against Old Mountain Properties in the Circuit Court of Jefferson County. Pursuant to this complaint, April Investments filed notice to take the deposition of Old Mountain Properties by and through its general partner Charles A. Clarkson; the deposition was scheduled to be taken in Birmingham. Old Mountain Proper-

ties filed a motion for protective order, seeking protection from the taking of the deposition of the general partner in Birmingham instead of in Jacksonville, Florida, on the basis that the uncontested facts show Old Mountain Properties to be a foreign limited partnership, with its principal place of business in Jacksonville, Florida, and that Charles R. Clarkson, the named deponent, is a resident citizen of the State of Florida. The trial judge, after hearing oral argument on Old Mountain Properties' motion for protective order, overruled the motion and ordered Old Mountain Properties to produce its general partner for deposition in Birmingham. It is from this ruling by the trial judge that Old Mountain Properties petitions this Court, asking us to order the trial judge to enter the protective order which they requested.

No rule or Alabama case provides a hard-and-fast rule on whether or not a non-resident corporate agent must come to the forum in order to give a deposition. This rule is especially applicable to matters of discovery, which are, and should be, left mainly to the discretion of the trial judge. As this Court stated in *Campbell v. Regal Typewriter Co., Inc.*, 341 So.2d 120, 123, 124 (Ala. 1976):

> "The Alabama Rules of Civil Procedure permit very broad discovery and the rules must be broadly and liberally construed. *Cole v. Cole Tomato Sales, Inc.*, 293 Ala. 731, 310 So.2d 210 (1975). However, ARCP 26(c) recognizes that the right of discovery is not unlimited, and gives the court broad power to control the use of the process and to prevent its abuse by any party. The rule does not allow an arbitrary limit on discovery, but instead vests the trial court with discretion in the discovery process. The question on review then becomes one of whether, under all of the circumstances, the trial

court has abused this discretion. *Tiedman v. American Pigment Corp.*, 253 F.2d 803 (4th Cir. 1957). In exercising its discretion, the trial court should be guided by the spirit of the rules, which is to permit full discovery so as to save time, effort and money and to expedite the trial with a view to achieving substantial justice for each litigant. *First National Bank in Greenwich v. National Airlines, Inc.*, 22 F.R.D. 46 (D.C.N.Y. 1958).

"The particular details of the discovery process must necessarily be left to the sound discretion of the trial court. The court may enter appropriate orders under ARCP 26(c) and if necessary, on a showing of undue burden, it may order alternative means of discovery. *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973). Of course, the fact that it may be difficult to produce information which is discoverable is not a justification for disallowing the discovery of that information. . . ."

Each request for a protective order must be considered on its own facts and equities; the trial court is in a better position to consider and weigh those factors than is an appellate court. This Court will not reverse the trial judge's determination of such discovery issues such as here presented (whether to require the deponent to come to Birmingham), unless there is a clear showing that the trial judge abused his discretion in making his decision.

Protective orders, of the type asked for by the petitioner, are only issued "for good cause" shown by the person seeking the protection. See A.R.C.P. 26(c), and *Assured*

Investors Life Insurance Co. v. National Union Associates, Inc., et al., 362 So.2d 228 (Ala. 1978). The trial judge did not abuse his discretion by finding that "good cause" did not exist in this case. Petitioner had the burden, under Rule 26(c) A.R.C.P. of showing adequate justification for its protective order. In light of all the facts of this case, the single assertion that the defendant is a foreign limited partnership with its principal place of business in Jacksonville, Florida, and that the named deponent is a resident citizen of the State of Florida does not, automatically, show that the trial judge abused his discretion by requiring the deposition to be taken in Birmingham. The ruling of the trial court in denying the motion for protective order is hereby affirmed.

WRIT DENIED.

Faulkner, Jones, Shores, Embry, Beatty and Adams, JJ., concur.

Torbert, C. J., dissents.

Almon, J., not sitting.

TORBERT, CHIEF JUSTICE (dissenting).

I respectfully dissent from the denial of a protective order in this case. As correctly stated by the majority, protective orders are issued only "for good cause" shown by the person seeking the protection, A.R.C.P. 26(c), and the decision of the trial judge will not be overturned unless an abuse of discretion is shown. *Campbell v. Regal Typewriter Co.*, 341 So.2d 120 (Ala. 1976). Though trial judges are vested with a broad range of discretion in determining what circumstances will justify a variation from the general rule, this range is not unlimited.

The general rule regarding pretrial discovery, though not specifically addressed by any Alabama cases, has been enunciated on several occasions by the federal courts and it states that the deposition of a corporate officer or agent (or, as here, a member of a limited partnership) must be taken at the business's principal place of business, absent peculiar circumstances justifying a change of venue. See, *e. g., Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979); 8 C. Wright and A. Miller, *Federal Practice and Procedure*, §212 at 410 (1970). It is fundamentally unfair to require a non-resident defendant, as here, to leave his place of business and travel at his own expense to the site of the deposition so that it can be taken more conveniently and less expensively to the plaintiff. *Less v. Taber Instrument Corp.*, 53 F.R.D. 645 (W.D.N.Y. 1971); *Perry v. Edwards*, 16 F.R.D. 131 (W.D. Mo. 1954). This rule, of course, may be altered if justice requires, upon the showing of *peculiar facts and circumstances*, which showing then gives the trial judge broad discretion to determine what circumstances will justi-

fy a change in the site of the deposition. Here, however, the only possible rationale for requiring the deposition to be taken in Birmingham was that Old Mountain Properties, LTD., owned some real estate in Alabama, thus providing minimum contacts. No peculiar facts and circumstances, however, were shown by April Investments, Inc., to justify the request to depose the general partner of Old Mountain Properties, LTD., in Birmingham.

While the definition of "good cause" has not yet been decided in Alabama, I believe that once a non-resident corporate defendant seeking a protective order has demonstrated that it is, in fact, a non-resident defendant and that the plaintiff seeks to compel its officer or agent to come into the state to be deposed, it has *prima facie* supplied the "good cause" required by A.R.C.P. 26(c) to compel the issuance of the protective order. At this point, the non-movant must assume the burden of proof to show "peculiar facts and circumstances" to justify a variance from the general rule. Such circumstances might include a consideration of the relative hardships to the non-moving party should the protective order be granted, a conflict in the evidence as to the corporation's principal place of business, the fact that the corporation's officers visit Alabama regularly, and/or the fact that the plaintiff is impecunious. *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204 (8th Cir. 1973); *Baker v. Standard Industries, Inc.*, 55 F.R.D. 178 (D.P.R. 1972); *Connell v. Biltmore Security Life Insurance Co.*, 41 F.R.D. (D.S.C. 1966); *Hirsch v. Glidden Co.*, 79 F. Supp. 729 (S.D.N.Y. 1948). Here, Old Mountain Properties, LTD., clearly showed that it was a non-resident defendant, yet April Investments, Inc., made absolutely no showing of any peculiar facts and circumstances that would justify the taking of the deposition in Birmingham.

The decision of the majority, in effect, makes Alabama the only jurisdiction to allow, as a matter of course, a plain-

tiff to chose his own forum based upon the defendant's minimum contacts, litigate all of the issues in his home territory, and compel a non-resident defendant to travel at his own expense to the forum whenever the plaintiff feels the need for discovery. This is not only contrary to the general rules of discovery, but is also, as a matter of policy, fundamentally unfair to the defendant.

Based upon the foregoing principles, I would hold that Old Mountain Properties, LTD., presented a *prima facie* showing of "good cause" for the issuance of the protective order; that April Investments, Inc., did not come forward with a showing of "peculiar facts and circumstances" to show why the deposition should be taken in Birmingham, Alabama, instead of the defendant's principal place of business in Jacksonville, Florida; and that the trial judge thus erred in refusing to grant the requested protective order.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, so hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness may hand this 9th day of April, 1982

/s/ J. O. Sentell
Clerk Supreme Court of Alabama

ON APPLICATION FOR REHEARING

MADDOX, JUSTICE.

Old Mountain Properties, Ltd. has filed an application for rehearing and strongly insists that this Court has adopted a rule regarding discovery depositions of non-resident defendants which is inconsistent with the federal rule, and in a supplemental brief strongly contends that this Court, on the same day that the original opinion was released in this case, also released an opinion in *Ex parte Richard E. Armstrong, et al.* and that "[t]he two opinions are in irreconcilable conflict."

Because of counsel's strong insistence that the original opinion states an inaccurate rule of law, and because this Court received two requests to file amicus briefs from lawyers who normally represent defendants in civil litigation, we have re-examined the opinion in light of this additional concern. After re-examining the original opinion, and after considering other cases in which we have been called upon to review, by mandamus, trial court judgments in discovery matters, we are convinced that the original opinion states a correct principle of law; but because of counsel's insistence to the contrary, we extend the opinion to answer some of counsel's charges.

We first address counsel's contention that *Ex parte Armstrong* [MS. April 9, 1982] _____ So. 2d _____ (Ala. 1982), is in irreconcilable conflict with the original opinion in this case. In *Ex parte Armstrong*, the Court, speaking through Mr. Justice Almon, with Chief Justice Torbert and Faulkner, Embry and Adams, JJ., concurring, did hold:

> "Depositions of a corporation through its officers or agents should ordinarily be taken at the corporation's principal place of

> business, especially when the corporation is a defendant. *Salter v. Upjohn Company*, 593 F.2d 649 (5th Cir. 1979). There may be circumstances that would justify the taking of a deposition somewhere other than the corporation's principal place of business."

As is quite apparent, the rule stated in *Ex parte Armstrong* is a general rule which applies to depositions of a corporation through its officers or agents. The fact that *Ex parte Armstrong* involved the deposition of a corporate president and this case involves the deposition of a general partner in a limited partnership is not necessarily a controlling factor, but, as the opinion in *Ex parte Armstrong* states, "there may be circumstances that would justify the taking of a deposition somewhere other than the corporation's principal place of business." Obviously, the rule stated in *Ex parte Armstrong* does not vary the general rule which this Court has consistently applied, that protective orders are issued only "for good cause" shown by the person seeking the protection, and that the decision of the trial judge will not be overturned except for a clear abuse of his discretion. *Campbell v. Regal Typewriter Co., Inc.*, 341 So.2d 120, 123, 124 (Ala. 1976). The Chief Justice, as he stated in his original dissent in this case, recognizes this general rule, but would find a clear abuse of the trial judge's discretion in any case where a non-resident defendant is involved, because, as he said in his dissent on original deliverance, he feels "[i]t is fundamentally unfair to require a non-resident defendant, as here, to leave his place of business and travel at his own expense to the site of the deposition so that it can be taken more conveniently and less expensively to the plaintiff." The general rule which this Court applies on petition for mandamus in cases involving discovery is succinctly stated in *Assured Investors Life Insurance Co. v. National Union Associates, Inc.*, 362 So.2d 228, 231, 232 (Ala. 1978):

"It is well settled that the Rules on deposition and discovery are to be broadly and liberally construed. *Cole*, [293 Ala. 731, 310 So.2d 210]. Rule 26(c), supra, recognizes, however, that the right to discovery is not unlimited, and the trial court has broad powers to control the use of the process to prevent its abuse by any party. See *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962); and *Delong Corp. v. Lucas*, 138 F. Supp. 806 (S.D.N.Y. 1956). The Rule does not allow an arbitrary limit on discovery; instead, it vests the trial court with judicial discretion in the discovery process. The question on review, then, becomes one of whether, under all the circumstances, the court has abused this discretion. *Campbell v. Regal Typewriter Co.*, 341 So.2d 120 (Ala. 1976). *An appellate court may not decide whether it would, in the first instance, have permitted the prayed for discovery. Furthermore, it is unusual to find abuse of discretion in these matters. Swanner v. United States*, 406 F.2d 716 (5th Cir. 1969); *Tiedman v. American Pigment Corp.*, 253 F.2d 803 (4th Cir. 1958); *Ex parte Alabama Power Co.*, 280 Ala. 586, 196 So. 2d 702 (1967); and 35A C.J.S. *Federal Civil Procedure* §§ 532, 592." (Emphasis added.)

It is clear that in *Ex parte Armstrong*, applying the general rule, the Court refused to supervise, by mandamus, the exercise of the trial judge's discretion in that case, to require the president of Alabama Power Company to go to Mobile for the taking of a deposition in a personal injury action.

The "circumstances" of each case, therefore, are important in determining whether a trial judge has abused his discretion.

As we have already pointed out, the case of *Ex parte Armstrong* dealt with depositions of a *corporate president*, and in this case, the person sought to be deposed was the general partner of Old Mountain Properties Ltd., and the person sought to be deposed personally dealt with the plaintiff, April Investments, in the State of Alabama, and frequently came to Alabama to participate in transactions made the basis of the very action in which the discovery is sought. Needless to say, we considered all of these "circumstances" and we refuse to supervise the trial judge *in this case*. In short, on original deliverance, we applied the rule set out in *Assured Investors Life Insurance Co.* to the effect that "[a]n appellate court may not decide whether it would, in the first instance, have permitted the prayed for discovery." We have opined that it is 'unusual" to overturn a trial judge in discovery matters.

In brief, counsel for Old Mountain Properties argues:

> "One practical point also needs emphasis. If the general partner of a little enterprise like Old Mountain Properties can be made to haul his records to Alabama, then the president of Ford Motor Company can be made to do the same. It would be less burdensome for Ford to send from Detroit an executive with all of Ford's internal memoranda and engineering data on an alleged manufacturing defect than for a small entrepreneur to send its only employee from Jacksonville. Does this Court actually think Hon. Thomas E. Huey, Jr. would have threatened a default judgment against Ford by denying it a protective order under these circumstances, even where it has facilities in Alabama? If the opinion of April 9 stands, Ford can expect it."

Counsel expresses a fear that trial judges may not exercise fairness when ruling on requests for protective orders involving non-resident defendants. Counsel overlooks the fact that in *Ex parte Armstrong*, a Mobile Circuit Judge refused to require the president of Alabama Power Company, a *resident* of Alabama, to go to Mobile.

Since receiving Old Mountain Properties' request for rehearing, this Court has decided another case involving a discovery matter in which this Court has again upheld the action of the trial judge. In *Ex parte McTier* [MS. May 21, 1982] _____ So.2 d _____ (1982), this Court refused to issue mandamus to compel a trial judge to order a defendant to answer an interrogatory which the trial judge considered too broad and oppressive. It is clear, therefore, that this Court has consistently followed the rule set out in *Assured Investors Life Insurance Co. v. National Union Associates, Inc.*, 362 So.2d 228, 231, 232 (Ala. 1978).

If trial judges clearly abuse their discretion, mandamus is appropriate, and in an appropriate case, we would be duty bound to grant relief, but as this Court has pointed out, it will only be in the "unusual" case that we will do so. That is the rule stated in the original opinion in this case. That is the rule stated in *Ex parte Armstrong*. That is the rule stated in *Ex parte McTier*.

The application for rehearing is due to be overruled and the requests by those who are not parties to this litigation to file amicus briefs are also due to be denied.

OPINION EXTENDED; APPLICATION FOR REHEARING OVERRULED; REQUESTS TO FILE AMICUS BRIEFS DENIED.

Faulkner, Jones, Shores, Embry, Beatty and Adams, JJ., concur.

Torbert, C. J., dissents.

Almon, J., not sitting.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 11 day of June 1982

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

APRIL 9, 1982

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1981-82

80-919
Ex Parte: Old Mountain Properties

PETITION FOR WRIT OF MANDAMUS

(In Re: April Investments, Inc., a corporation vs. Old Mountain Properties, Ltd., a Maryland limited partnership, et al.)

ORDER

This cause having been duly argued and submitted on the petition for writ of mandamus and the response and briefs filed thereto, IT IS CONSIDERED AND ORDERED that the Petition for Writ of Mandamus be, and the same is hereby, denied.

OPINION BY MADDOX, J.
FAULKNER, JONES, SHORE, EMBRY, BEATTY AND ADAMS, JJ., CONCUR,
TORBERT, C. J., DISSENTS.
ALMON, J., NOT SITTING.

July 8, 1982

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1982

80-919
EX PARTE: OLD MOUNTAIN PROPERTIES, LTD.

PETITION FOR WRIT OF MANDAMUS

(Re: April Investments, Inc., a Corporation v. Old Mountain Properties, Ltd., a Maryland limited partnership, et al.)

ORDER

IT IS ORDERED that the second application for rehearing filed in this cause be, and the same is hereby, stricken.

IT IS FURTHER ORDERED that the motion for stay be, and the same is hereby, denied.

All Justices concur, except Torbert, CJ., who dissents.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

Ex Parte
OLD MOUNTAIN PROPERTIES, LTD.
SC 80-919

MOTION

Pursuant to Rule 29, Rules of Appellate Procedure, the undersigned respectfully request leave to file the attached brief amicus curiae in support of the petitioner's application for rehearing in the above designated cause. The interest of applicant is simply that as an Alabama law firm and as officers of this Court we are interested in assuring procedural fairness for all litigants in the courts of Alabama, and particularly the large number of our clients who are not residents of the State of Alabama.

SADLER, SADLER, SULLIVAN,
SHARP & STUTTS

By: /s/ Charles E. Sharp
Charles E. Sharp
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BRIEF AMICUS CURIAE

This law firm has never before attempted to inject itself into a controversy between parties not represented by this firm. However in this instance, it is so obvious to us what the effect will be on this firm's clients if the present opinion of this Court becomes the law of Alabama, that we feel compelled at least to let the Supreme Court of Alabama know how we feel, and why. As officers of this Court we should do no less.

Not only do we want the Court to know that we agree wholeheartedly with dissent written by Mr. Chief Justice Torbert, but we would like to emphasize the practical effects of allowing a trial judge free rein to order a foreign defendant to come here for discovery.

It has been our experience that it was to our personal advantage, as lawyers, on some occasions to have our foreign corporate client come to Alabama for discovery by a local plaintiff, but the choice should always be that of the foreign defendant, and not what is convenient for the Alabama citizens involved, whether they be the plaintiff or the lawyers.

The opinion of Mr. Justice Maddox, writing for the majority, relys almost exclusively on *Assured Investors Life Insurance Co. v. National Union Associates, Inc.*, 362 So.2d 222 (Ala. 1978). We respectfully submit that there are at least three reasons why this case is not authority for the result reached.

In the first place, this Court there said:

> Our Rules of Civil Procedure are based upon, and are strikingly similar to, the Federal Rules of Civil Procedure. Because these

> two sets of Rules are virtually verbatim, a presumption arises that cases construing the Federal Rules are authority for construction of the Alabama Rules. [citing cases]. 362 So.2d 231.

We cannot find any "cases construing the Federal Rules" which stand for the proposition announced by this Court, namely, that a trial judge has complete discretion to make a foreign defendant, who did not select the forum, come to the forum state at his own expense to submit to deposition without any proof being offered by the forum plaintiff to show why such an order is fair and not oppressive. More important, we find no such federal decision cited by this Court in its opinion.

Secondly, in *Assured Investors* this Court was not dealing with a situation anything like this situation. There the Court was dealing with production of "certain documents in the possession of Earl C. Morgan, District Attorney". 362 So.2d 230. Mr. Morgan's motion for protective order there filed pursuant to Rule 26(c), A.R.C.P., sought protection on the grounds "that the documents were the work product of an on going criminal investigation collateral to the civil action" and that the documents "were protected under an executive privilege". 362 So.2d 230. There was absolutely no allegation nor proof of "annoyance, embarrassment, oppression, or undue burden or expense", the items set forth in Rule 26(c). It was therefore entirely appropriate for this Court there to find that the person seeking the protective order had not met the burden of showing "good cause", because the person seeking protection had not shown anything remotely described in Rule 26(c) as being "good cause". That is not true in a case where a foreign defendant clearly shows that the deponent employed by a non-resident defendant resides in another state and where the Alabama plaintiff fails to show any fact which would

militate against the sense of gross unfairness which wells up when such a person is ordered to come at his own expense to Alabama.

Thirdly, when this Court in *Assured Investors* discussed "judicial discretion" under Rule 26(c), it said:

> Rule 26(c), supra, recognizes, however, that the right to discovery is not unlimited, and the trial court has broad powers to control the use of the process *to prevent its abuse by any party.* (emphasis added) 362 So.2d 231.

The Court was recognizing liberality in the application of the rules of discovery to *prevent* abuse but not liberality in the application of the rules to *permit* abuse.

CONCLUSION

Simply to say that a trial judge has "discretion" in discovery matters, without providing any guidelines or any recognizable limitations on that "discretion", is, in our opinion, a judicial "cop-out", which if not changed on application for rehearing, will create severe problems for the courts, lawyers and litigants, all of which can be prevented by facing the issue now. The opinion of April 9 is nothing more than a postponement of the inevitable need to lay down guidelines. Even fair-minded and intelligent trial judges have a right to look to this Court for guidance and not to be turned loose to "do their own thing". They should not be told that Rule 26(c) is a license to prefer Alabama plaintiffs over foreign defendants.

This brief does not address the constitutional questions brooding in this situation.

Respectfully submitted,

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